In the Matter of:	
Albert Bauman,	**Date Issued: May 12, 1999**
Claimant	**Case No. 1998-LHC-1038**
v.	**OWCP No. 7-145429**
Domino Sugar Corporation,	
Employer	
and	
Cigna Insurance Company,	
Carrier	

APPEARANCES:

James E. Vinturella, ESQ.
Lewis & Caplan
3631 Canal Street
New Orleans, Louisiana 70119
For Claimant

James A. Babst, ESQ.
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601 Poydras Street, Suite 2750
New Orleans, Louisiana 70130
For Employer/Carrier

BEFORE: JAMES W. KERR, JR.
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, et seq., (the "Act") and the regulations promulgated thereunder. This claim is brought by Albert Bauman, Claimant, against his former employer, Domino Sugar, Inc., Employer, and its insurance carrier, Cigna Insurance Company, Carrier. A hearing was held in Metairie, Louisiana on October 20, 1998 at which time the parties were represented by counsel and given the opportunity to offer testimony and documentary evidence and to make oral argument. The following exhibits were received into evidence:

1) Court's Exhibit No. 1 ;

2) Claimant's Exhibits Nos. 1-5; and

3) Employer's Exhibits Nos. 1-6.[1]

Upon conclusion of the hearing, the record remained open for submission of written closing arguments which were received from both parties. This decision is being rendered after having given full consideration to the entire record.

Stipulations

After evaluation of the entire record, the Court finds sufficient evidence to support the following stipulations:

(1) That an injury/accident allegedly occurred on July 8, 1997;

(2) That the fact of the injury/accident is disputed;

(3) That there was an employer/employee relationship existing at the time of the alleged injury;

(4) That the alleged injury arose in the course and within the scope of employment;

(5) That the date the Employer was notified of the injury was July 9, 1997;

(6) That the date of notification of the injury/death pursuant to Section 12 of the Act to Employer was July 9, 1997 and to the Secretary of Labor was July 14, 1997;

(7) That an informal conference was held on November 25, 1997;

(8) That disability resulted from the injury is disputed;

(9) That medical benefits and disability benefits have been partially paid;

(10) That Employer paid temporary total disability from July 9, 1997 to July 30, 1997 for a total of $1,281.33;

(11) That the Notice of Controversion was filed on October 30, 1997; and

(12) That Claimant's average weekly wage was $640.66.

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[1] The following abbreviations will be used in citations to the record: CTX - Court's Exhibit, CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

Issues

The unresolved issues in this proceeding are.
(1) Cause of Claimant's disability;
(2) Maximum Medical Improvement
(2) Nature and Extent of Claimant's disability; and
(3) Claimant's entitlement to continued medical care.

Summary of the Evidence

Testimonial Evidence

Albert Edgar Bauman

Claimant testified he completed high school and immediately began work as a longshoreman. He stated he has worked as a longshoreman almost continuously since 1978, except for a five year period where he was employed as a laborer and truck driver for the Sewerage and Water Board.[2] As a longshoreman Claimant explained his duties of loading and unloading vessels often required lifting sacks weighing 110 pounds, hooks which weighed between 30 and 60 pounds, and chains weighing 50 to 60 pounds, although Claimant acknowledged he was provided with a partner to aid with the lifting. TR pp. 19-22, 40-41, 47-48.

Claimant described himself as an "A2 longshoreman" at the time of his accident and explained that in the longshore industry there is a seniority system for job placement beginning with A1's, followed by A2's, and ending with A3's and B's. Claimant stated he obtained A2 status after five years of longshore work (700 hours), a physical and a job test. Claimant testified at the time of his injury there was plenty of longshore work available and, therefore, he was working six or seven days a week. He explained that the availability of work fluctuated throughout the year and thus, so did his work schedule. TR pp. 19-20, 41- 44.

According to Claimant, on July 8, 1997 he was working at Domino Sugar in the bulk of a sugar boat. Claimant explained at the time of the accident he was scraping sugar off the wall of the ship and shoveling the sugar into the middle of the ship where it could then be retrieved by a bulldozer. Claimant testified as he was shoveling the sugar, which required him to twist his back, he heard a click sound in his back and felt immediate pain. Claimant stated he proceeded to the office where he informed Andre Robinson, the foreman, of his accident and Mr. Robinson allowed Claimant to return home. TR pp. 22-24.

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[2] On cross-examination Claimant explained the Commercial Driver's License he obtained while employed with the Sewerage and Water Board expired in 1997 and because he felt he was incapable of passing the necessary physical and because of the renewal expense, Claimant did not renew his license.

Claimant testified he awoke the following morning in intense pain and returned to work where he requested Mr. Robinson to authorize him to see a physician. Claimant stated he received authorization to visit Dr. Joseph T. Segura, the company doctor, and upon his first examination of July 9, 1997, Dr. Segura placed him on light duty. Claimant testified Dr. Segura released him to return to work after three weeks of treatment. After his release, Claimant returned to the hiring hall to await assignment but testified that after he was chosen for a position he opined he was unable to perform the necessary bending and lifting requirements of the job. TR pp. 24-28.

Claimant explained after he left the hiring hall that morning he returned to Dr. Segura, but Dr. Segura informed Claimant he was no longer authorized to treat him. Claimant testified, after searching the yellow pages, he selected Dr. Phillips who first examined Claimant on August 7, 1997. According to Claimant, Dr. Phillips provided Claimant a brace for his back, a prescription of Vicodin, and removed Claimant from work. Claimant testified Dr. Phillips recommended and Claimant began a physical therapy program, but after three months of therapy Claimant was forced to discontinue the treatment because the therapy bills were not being paid. TR pp. 29-31.

Claimant testified he has continued to experience problems with his back, including pain in his lower back extending into his thigh, buttocks and calves, and occasional numbness. Claimant stated he had been involved in two previous auto accidents, one in 1994 and the second in 1995 in which he received injuries to his back, but testified he had fully recovered from those injuries prior to his July 8, 1997 on-the-job accident. Claimant testified that in between the car accidents and the injury in question he performed longshore work including loading and unloading ships and lifting sacks without difficulty. Claimant explained that in previous settings, while providing a history to doctors and in his deposition, he had denied any previous injuries to his back because he understood the questions to mean recent injuries, and that it was not until he was required to answer interrogatories that he was informed that when questioned about previous injuries he was to include any injury in his lifetime. TR pp. 31-36.

Claimant testified he met with Ms. Nancy Favaloro, vocational expert, on October 13, 1997 and that she provided him with a list of job leads. Claimant stated he contacted each of the four employers listed and was awaiting a response from three of the employers and the fourth, Hospitality Enterprises, informed Claimant it was only hiring experienced dispatchers. Although Claimant alleged he was incapable of returning to his previous longshore position, he stated he was capable of returning to some form of employment and that he wanted and needed to work. Claimant testified he has additionally searched for employment in the newspaper ads but has not found any jobs which interest him. TR pp. 36- 40, 48.

Claimant disagreed with the testimony of Mr. Andre Robinson, Claimant's supervisor and explained that while Mr. Robinson found it unusual for Claimant to have accepted a job working in the hold of a ship on the day of his accident, he accepted the lower paying position offered because he wanted work and testified he was unable to obtain a higher paying position. Claimant also explained that, contrary to Mr. Robinson's testimony that there was only a small amount of sugar left in the hold of the ship on the morning of July 8, 1997, there was actually a few feet of sugar in the hold that morning and thus his work required the use of a shovel. TR pp. 66-75.

Andre Robinson

Mr. Robinson testified, on July 8, 1997, the date of Claimant's alleged accident, he was employed as a longshoreman and foreman for Domino Sugar Refinery where his duties included hiring workers daily to offload ships. Mr. Robinson stated he was notified by Claimant of his injury on the day of his alleged incident and allowed Claimant to return home for the day. According to Mr. Robinson, Claimant returned the following day and, after meeting with Herman Burns, Superintendent, obtained authorization to visit the company physician. TR pp. 50-53.

Mr. Robinson testified he found it unusual that Claimant agreed to work in the hold of the ship for Domino on the day of his accident because there was other work available which generally paid more but was less physically demanding. According to Mr. Robinson, when he questioned Claimant as to why he chose this assignment, Claimant explained that he wanted to work. Mr. Robinson testified Claimant's work in the hold of the ship on July 8, 1997, although hot, was not physically demanding, but involved scraping the sugar off the walls of the ship and sweeping it into a pile for retrieval by the tractor. Mr. Robinson testified the sugar was about a half a foot to a foot deep on the morning of July 8, 1997. While Mr. Robinson stated this type of work was generally completed using a broom, he acknowledged it was possible Claimant was using a shovel on the day of his alleged accident. Mr. Robinson opined there was not enough sugar in the hold of the ship on the day of the alleged incident for Claimant to have injured himself performing his duties. TR pp. 54-64.

Ms. Nancy Favaloro

Ms. Favaloro was accepted as an expert in the field of vocational rehabilitation. After hearing a portion of Dr. Phillip's deposition in which he restricted Claimant from performing heavy work, particularly any work which required lifting over 50 pounds, Ms. Favaloro testified that could prohibit Claimant from performing longshore employment. TR pp. 85-93.

Ms. Favaloro stated she performed a labor market survey in this case and provided the survey results identifying four available positions to Claimant in a letter dated October 13, 1998. Ms. Favaloro testified it surprised her that Hospitality Enterprises informed Claimant dispatching experience was necessary for the available position because they informed her otherwise. She was not surprised Claimant had difficulty reaching someone at the Hilton Hotel regarding an unarmed security position. Regarding the two remaining positions with Pop-a-lock and American Commercial Security Service, Ms. Favaloro explained, because of the nature of the business and the resulting scheduling conflicts, it is their practice to take a name and number and contact the potential employee at an appropriate time. Ms. Favaloro acknowledged the four employment positions identified in the labor market survey were not specifically provided to Dr. Phillips for approval, but she explained none of the positions required lifting over fifty pounds and all were within the light job category. While three additional jobs were listed on an updated labor market survey presented at trial, Ms. Favaloro stated Claimant had not been provided with the additional leads. TR pp. 93-98.

Deposition Testimony

Stuart Phillips, M.D.

On June 22, 1998, Dr. Stuart Phillips, board certified orthopedist, testified by deposition that he examined Claimant twice, first on August 7, 1997, and then again on August 21, 1997. Claimant reported an accident in July, 1997 when he heard a click in his back while shoveling sugar and felt immediate pain. Dr. Phillips testified Claimant denied any previous history of neck or back pain and he scheduled Claimant for an MRI and x-rays. CX 1 pp. 1-8.

According to Dr. Phillips, Claimant's physical examination performed on August 7, 1997 revealed mechanical back problems, and objective findings revealed decreased lordosis, explained as a flattening of the spine from muscle spasm. X-rays of Claimant's lumbar spine revealed a decrease in joint height and hypermobility at L4-5. Dr. Phillips testified Claimant's findings were consistent with his subjective complaints. When Claimant returned in two weeks, on August 21, 1997, with continued complaints of stiffness in his back, Dr. Phillips opined Claimant's condition had not changed since his previous visit and physical therapy was prescribed. CX 1 pp. 8-11.

Claimant underwent an MRI on August 8, 1997, and Dr. Phillips testified the MRI revealed a bulging of the L4-5 disc large enough to impinge upon the nerve in the right lateral recess, but no right sciatica. Dr. Phillips opined that on the day of Claimant's accident he suffered from a pre-existing degenerative disc disease which weakened Claimant's ligament resulting in a tear to his ligament while he was shoveling sugar. Dr. Phillips testified he was unaware Claimant suffered from any previous back injuries. CX 1 pp. 11-17.

Dr. Phillips reviewed Dr. Segura's records and disagreed with his assessment that the MRI was normal. Dr. Phillips testified the radiologist clearly noted an abnormality in the L4-5 disc level which renders the results abnormal. After reviewing the independent medical evaluation performed by Dr. Steiner, Dr. Phillips noted that while he and Dr. Steiner obtained similar findings during the physical examination, the difference was that Dr. Steiner failed to find Claimant credible. Dr. Phillips testified there was nothing in his evaluation which led him to believe Claimant was untruthful regarding his subjective complaints and that the testing methods used by Dr. Steiner, which led him to opine Claimant was not credible, were unreliable. Dr. Phillips explained if Claimant was to continue treatment additional testing, such as a discogram with post-discogram CT and EMG nerve conduction studies, should be performed because a discogram would reveal if Claimant suffered from a torn ligament. If a discogram revealed a torn ligament, Dr. Phillips testified Claimant could be treated conservatively, with restrictions of activities, medication and physical therapy, or operatively, with an anterior fusion. CX 1 pp. 17-23.

Assuming Claimant continued to complain of back and leg pain, Dr. Phillips opined, based upon Claimant's history, examination, and test results, Claimant's complaints were a result of his July 9, 1997 on-the-job injury and that Claimant has not yet reached maximum medical improvement, but is in need of further orthopedic treatment. Dr. Phillips testified he would restrict Claimant from heavy work requiring lifting of more than fifty pounds. CX 1 pp. 23-28.

Robert A. Steiner, M.D.

On October 15, 1998, Dr. Robert Steiner, orthopedic surgeon, testified by deposition he examined the Claimant once, on February 5, 1998, at Employer's request and was provided with Claimant's medical records for his review. Dr. Steiner testified he obtained a history from Claimant wherein Claimant related an on-the-job injury when he was shoveling sugar on a boat and twisted his back causing pain in his lower back. Dr. Steiner stated Claimant presented with complaints of constant low back pain, pain in both buttocks, both thighs and both heels periodically. According to Dr. Steiner, Claimant denied any previous injury to his lower back. RX 1 pp. 1-7.

Dr. Steiner explained the physical examination of Claimant revealed subjective complaints of pain, but no acute distress. Based upon a variety of tests administered, Dr. Steiner testified the results of Claimant's physical examination were inconsistent, but admitted the inconsistencies could be a result of pain. Dr. Steiner testified he then reviewed x-rays of Claimant's pelvis, hip, and lumbar spine and all x-rays were normal. While the MRI of Claimant's lumbar spine, obtained on August 7, 1997, revealed a right foraminal protrusion at L4-5 causing some right foramina narrowing, Dr. Steiner stated there were no findings of neurological impingement of the nerve root and no evidence that any ligament was disrupted. Dr. Steiner explained that a pop, such as Claimant testified he experienced, is common and probably a result of a change in pressure in the facet joints. RX pp. 7-21.

While Dr. Steiner did not opine further testing of Claimant was necessary based upon the clinical exam, he stated that other tests, including a myelogram and post myelogram CT and EMG tests could be administered. Dr. Steiner testified he would not recommend Claimant undergo a discogram because it would be repetitive following the MRI and because part of the discogram findings would be based upon Claimant's subjective complaints, which Dr. Steiner found inconsistent. RX pp. 21-23.

Based upon the examination, history, and review of medical records, Dr. Steiner testified he agreed with Dr. Segura and opined Claimant could return to full duty employment with no disability. He stated that because of the absence of objective clinical findings on Claimant's examination, inconsistent and non-physiologic findings on the exam, and the finding of only a minor and probably unrelated bulge, Dr. Steiner would not restrict Claimant from returning to his regular heavy duty employment. However, on cross-examination Dr. Steiner admitted there were abnormal objective findings in Claimant's examination, including the mild disc bulge at L4-5, light sensory diminishment, and an S1 dermatomal pattern. RX pp. 23.

Dr. Steiner acknowledged the soft tissue injury Claimant sustained following an auto accident in July, 1995, should have healed in about three months and he would not expect Claimant to continue experiencing symptoms from the 1995 injury in July, 1997. When questioned regarding his diagnosis of degenerative disc disease, Dr. Steiner stated it was possible that trauma could aggravate this condition and cause it to become symptomatic and that an individual with degenerative disc disease may be more susceptible to injuring their back. RX 1 pp. 31-43.

Medical Evidence

Joseph F. Guenther, M.D.

Claimant was first examined by Dr. Guenther on July 17, 1995 following an automobile accident on July 15, 1995. Claimant presented with complaints of pain in his head, neck, back, both shoulders and left side and reported involvement in an automobile accident in 1994 in which he injured his neck, back and head. Following examination, Dr. Guenther's impression was that Claimant suffered from blunt trauma, cervical strain, bilateral trapezius muscle strain, lumbar strain, and contusion of the head with post traumatic cephalgia. Medication and therapy was prescribed. X-rays of Claimant's cervical and lumbar spine, and right and left shoulder, and skull were taken on July 20, 1995 and all were within normal limits. RX 3 pp. 1-3, 10-11.

Claimant returned to Dr. Guenther on August 21, 1995 with continued complaints of shoulder symptoms, on September 25, 1995 noting some improvement, and on October 16, 1995 with Claimant reporting intermittent pain. On November 7, 1995, Dr. Guenther increased Claimant's therapy sessions to three times a week and recommended Claimant obtain an evaluation by the physical therapist. When Claimant returned on January 11, 1996 he related improvement, and because the examination was normal, Claimant was released from Dr. Guenther's care. RX 3 pp. 3-5.

Joseph T. Segura, M.D.

Claimant was evaluated by Dr. Segura, the company doctor, on July 9, 1997 after Claimant reported the onset of back pain while shoveling sugar. Dr. Segura treated Claimant for a lumbar sacral strain of his back for three weeks. Dr. Segura stated Claimant gradually improved over a three week period and because physical examination and routine x-rays and MRI were within normal limits, he discharged Claimant to return to his previous employment on July 29, 1997. RX 4 p. 2.

Pendleton Memorial Methodist Hospital

Records from Pendleton Memorial indicate Claimant underwent x-rays of his lumbar spine on July 9, 1997 which revealed an L3 anomaly to be correlated clinically. CX 3 p.1. On August 7, 1997 Claimant underwent an MRI of the lumbar spine and the radiologist's impression was of a right disc bulge at L4-5 which appeared to slightly impinge the right lateral recess at that level. CX 2 p.1.

Associated Therapy Services, Inc.

Claimant first presented for physical therapy on November 11, 1997 complaining of pain in his lower back and hips with radicular "burning" in the left lower extremity into the foot. Joseph Tidwell, physical therapist, recommended Claimant return for physical therapy three times a week and his program was to include therapeutic exercises, heat modalities, and a home exercise program. According to the records, Claimant returned regularly for treatment through January 19, 1998 when Judith Halverson, physical therapist, reported therapy would be discontinued until Claimant was reevaluated by Dr. Phillips. CX 4.

Robert A. Steiner, M.D.

Dr. Steiner examined Claimant on February 5, 1998 with Claimant relating a history of a back injury while working in July, 1997. Claimant presented with complaints of constant low back pain, pain in both buttocks, thighs, and heels on a periodic basis, tingling in his buttocks and heels, and weakness in his legs. Physical examination revealed no acute distress and inconsistent results on range of motion exercises. X-rays of Claimant's pelvis and lumbar spine were within normal limits, and the MRI of Claimant's lumbar spine revealed a right foraminal protrusion at L4-5 causing right foraminal narrowing. Dr. Steiner opined Claimant had no objective findings on examination and that Claimant could return to his regular duty work. RX 2 pp. 1-3.

Vocational Evidence

Nancy T. Favaloro, MS, CRC

On October 19, 1998, Ms. Favaloro, a vocational rehabilitation counselor with Seyler Favaloro, Ltd., completed a Vocational Rehabilitation Report. The Report indicates Ms. Favaloro met with Claimant on October 5, 1998. After interviewing Claimant, reviewing medical records, and performing vocational testing, Ms. Favaloro identified four jobs within Claimant's educational abilities and physical limitations including a car door lock technician, a dispatcher, and two unarmed security guard positions, with the positions paying between $6.00 and $8.00 an hour. Three additional jobs were identified as of October 13, 1998 which included two security officer positions and a position as a shuttle bus driver, and the positions paid between $5.30 and $7.75 an hour.
RX 6.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon the Court's observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, the Court has been guided by the principles enunciated in Director, OWCP v. Maher Terminals, Inc., 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, the Court may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on its own judgment to resolve factual disputes or conflicts in the evidence. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251, 28 BRBS 43 (1994).

I. Fact of Injury

To establish a prima facie claim for compensation, a claimant need not affirmatively establish a connection between the work and harm. Section 20(a) of the Act, 33 U.S.C. §920(a), provides claimant with a presumption that his injury was causally related to his employment if he establishes that he suffered a physical injury or harm and that working conditions existed or a work accident occurred which could have caused, aggravated, or accelerated the condition. See Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989). An accidental injury occurs if something unexpectedly goes wrong within the human frame. An injury need not involve an unusual strain or stress; it makes no difference that the injury might have occurred wherever the employee might have been. See Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968); Glens Falls Indemnity Co. v. Henderson, 212 F.2d 617 (5th Cir. 1954). The claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. Hampton v. Bethlehem Steel Corp., 24 BRBS 141 (1990); Golden v. Eller & Co., 8 BRBS 846 (1978), aff'd, 620 F.2d 71 (5th Cir. 1980). However, the claimant must show the existence of working conditions which could have conceivably caused the harm alleged. See Champion v. S&M Traylor Bros., 690 F.2d 285, 295 (D.C. Cir. 1982).

Based on the evidence of record, this court finds Claimant has established a prima facie case for compensation. First, Claimant's credible testimony established Claimant injured his back while shoveling sugar. Claimant testified that on July 8, 1997, he heard a pop in his back while he was working in the hold of a ship and experienced an immediate onset of pain in his lower back. Claimant remained out of work for the remainder of that day and when he attempted to return to work the following day, by his testimony, he was unable to perform the required duties. Additionally, Dr. Segura, the company doctor and the first physician to examine Claimant, diagnosed him with a lumbar sacral strain of his back as a result of his on-the-job accident of July 8, 1997. Finally, Dr. Phillips, Claimant's choice of physician, treated Claimant in August, 1997, and in his deposition testimony related Claimant's injuries to his on-the-job accident. Therefore, Claimant's credible testimony, as well as the opinions of Drs. Segura and Phillips, relate Claimant's injury to his employment and specifically to his on-the-job incident of July 8, 1997.

Once Claimant has invoked the presumption, the burden shifts to employer to rebut the presumption with substantial countervailing evidence. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989). The employer must present specific and comprehensive medical evidence proving the absence of or severing the connection between such harm and employment or working conditions. Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989); James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2d Cir. 1982); Del Vecchio v. Bowers, 296 U.S. 280 (1935).

Based upon the testimony and medical records of evidence, this court finds Employer has failed to rebut the presumption with substantial countervailing evidence. While Employer directs this court's attention to the testimony and medical records of Dr. Steiner, his opinion is unpersuasive. Dr. Steiner examined Claimant on February 5, 1998 and based upon his examination and x-ray results, he opined Claimant was malingering. According to Dr. Steiner, Claimant displayed inconsistent results on various aspects of his clinical examination and, despite Claimant's subjective complaints of pain, Dr. Steiner found no objective signs of injury evidenced on Claimant's x-rays. However, Dr.

Steiner examined Claimant only once, more than six months following his on-the-job accident, and the physical examination took just fifteen minutes. Furthermore, Dr. Steiner, while finding Claimant's injury had resolved as of February 5, 1998, failed to speculate as to whether or not Clamant received some sort of injury immediately following his July, 1997 on-the-job accident. Therefore, there is no physician on record denying Claimant received some type of injury following his on-the-job incident of July 8, 1997, and thus Employer has failed to offer substantial countervailing medical evidence to rebut Claimant's presumption.

Employer next argues Claimant's lack of credibility should merit substantial countervailing evidence, however, Employer's allegations have been addressed and dismissed to this court's satisfaction. While it is true Claimant failed to report previous back injuries he sustained as a result of automobile accidents in 1994 and 1995 to any of the physicians treating him for this injury, he explained he misunderstood the question to mean any recent back injuries. When Claimant was informed by his attorney that questions regarding previous injuries were intended to cover injuries sustained throughout Claimant's lifetime, Claimant, in his Responses to Interrogatories, acknowledged both automobile accidents and provided full details of all previous back injuries. Based on this explanation, this court finds Clamant's error was based on a misunderstanding and was not an intentional deceit.

Likewise, while Employer questions Claimant's choice to work in the hold of a ship on the day of his accident, Claimant's description of the job, and his explanation of his injury, this court finds no merit to Employer's arguments. Claimant explained that while other positions may have been available to him on the day of his accident, he chose to perform the more manual labor of working in the hold of a vessel in order to ensure employment on that day. Additionally, while Claimant and Mr. Robinson, Claimant's supervisor, disagree on the level of sugar in the hold of the vessel on the morning of July 8, 1997, the depth of the sugar is irrelevant. Regardless of the sugar level that morning, Claimant testified he was using a shovel and not a broom to move the sugar to an area where it was retrievable by tractor and that he injured his back while doing so, and Mr. Robinson acknowledged that while the work could have been performed with a broom, it was possible Claimant was using a shovel on the day of the incident. Furthermore, Claimant's recitation to all of his treating physicians and to this court of the manner in which he sustained his injury has been entirely consistent. Thus, although Employer attempts to discredit Claimant and asserts his allegation of an on-the-job injury was contrived and premeditated, there is no evidence in the record to support such a conclusion.

In sum, both Drs. Segura and Phillips acknowledged Claimant injured his back as a result of his on-the-job incident of July 8, 1997. Not a single physician has speculated otherwise and Claimant's testimony has been accepted as credible. Therefore, based upon the foregoing, this court finds Employer has failed to offer substantial evidence to rebut the §20 presumption. However, even if Employer had met its burden, when weighed as a whole the evidence supports a finding that Claimant sustained a back injury as a result of his on-the-job accident of July 8, 1997.

II. Maximum Medical Improvement

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. Louisiana Insurance Guaranty Assoc. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979). However, if the medical evidence indicates that the treating physician anticipates further improvement, unless the improvement is remote or hypothetical, it is not reasonable for a judge to find that maximum medical improvement has been reached. Dixon v. John J. McMullen & Assoc., 19 BRBS 243, 245 (1986); See Mills v. Marine Repair Serv., 21 BRBS 115, 117 (1988). The mere possibility of surgery does not preclude a finding that a condition is permanent, especially when the employee's recovery or ability is unknown. Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200, 202 (1986); White v. Exxon Co., 9 BRBS 138, 142 (1978), aff'd mem., 617 F.2d 292 (5th Cir. 1980).

A judge must make a specific factual finding regarding maximum medical improvement, and cannot merely use the date when temporary total disability is cut off by statute. Thompson v. Quinton Eng'rs, 14 BRBS 395, 401(1981). If a physician does not specify the date of maximum medical improvement, however, a judge may use the date the physician rated the extent of the injured worker's permanent impairment. See Jones v. Genco, Inc., 21 BRBS 12, 15(1988). The date of permanency may not be based on the mere speculation of a physician. Steig v. Lockheed Shipbuilding & Constr. Co., 3 BRBS 439, 441 (1976). In the absence of any other relevant evidence, the judge may use the date the claim was filed. Whyte v. General Dynamics Corp., 8 BRBS 706, 708(1978).

Based upon the opinion of Dr. Phillips, Claimant's treating physician, this court finds Claimant has not yet reached maximum medical improvement (MMI) but is in need of further orthopedic treatment. Dr. Phillips based his assessment on both Claimant's subjective complaints and the objective results of his MRI, which revealed a bulging disc at the L4-5 level. Dr. Phillips opined Claimant tore a ligament that had already been weakened by the bulging disc which, he opined, explained the popping sound Claimant heard prior to the onset of his pain. Because Claimant has continued to complain of pain, and because Dr. Phillips has opined Claimant's complaints to be credible and verified by objective findings, he recommended additional testing to ensure a reliable diagnosis. Thus, according to Dr. Phillips, Claimant has not yet fully recovered from the injury sustained in his July 8, 1997 accident and, therefore, has not yet reached MMI.

While both Drs. Segura and Steiner have concluded Claimant could return to regular duty, this court finds neither physician's opinion as persuasive as Dr. Phillips'. While Dr. Segura treated Claimant for three weeks following his injury, on July 29, 1997 he discharged Claimant and opined he could return to regular duty, dismissing the bulging disc identified in Clamant's MRI as "a normal variation". However, Claimant's credible testimony establishes Dr. Segura's release was premature. Although Claimant attempted to return to his previous heavy duty position upon Dr. Segura's release, he found himself unable to perform the necessary job requirements. Additionally, Dr. Phillips

described the MRI results as much more than a routine variation, and noted that the radiologist identified a slight impingement of the right lateral recess at the L4-5 level due to the bulging disc.

Likewise, Dr. Steiner also determined Claimant could return to his previous employment, but his decision was based upon only a fifteen minute examination of Claimant. Furthermore, Dr. Steiner originally testified he discharged Claimant because there were no objective findings to substantiate Claimant's subjective complaints of pain. However, on cross-examination Dr. Steiner admitted the L4-5 disc bulge revealed in Claimant's MRI was an objective finding, as was the light sensory diminishment and an SI dermatomal pattern Dr. Steiner noted in his evaluation. Additionally, while Dr. Steiner found the results of Claimant's testing to be inconsistent and therefore determined Claimant to be malingering, Dr. Phillips explained the tests used by Dr. Steiner are unreliable at best and Dr. Phillips specifically indicated he found Claimant to be credible. Finally, even Dr. Steiner acknowledged further testing could be performed in an effort to better evaluate Claimant's subjective complaints of pain.

Thus, based upon the medical records and testimony of Dr. Phillips, this court finds Claimant has not yet reached maximum medical improvement, but is in need of additional treatment. Therefore, any disability awarded Claimant will be temporary in nature.

III. Nature and Extent of Disability

Disability under the Act means "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. §902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to either have no loss of wage earning capacity, a total loss, or a partial loss. The employee has the initial burden of proving total disability.

To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). It is not necessary that the work related injury be the sole cause of the claimant's disability. Therefore, when an injury accelerates, aggravates, or combines with the previous disability, the entire resulting disability is compensable. Independent Stevedore Co. v. Alerie, 357 F.2d 812 (9th Cir. 1966).

This court finds Claimant has established a prima facie case of total disability as of July 9, 1997. Dr. Segura, the company doctor and the first physician to treat Claimant, placed Claimant on light duty on July 9, 1997, opining Claimant was incapable of performing his previous heavy duty employment. Additionally, Dr. Phillips, Claimant's treating physician, has testified in his opinion Claimant is incapable of returning to his previous heavy duty employment. Thus, based upon the opinions of Drs. Segura and Phillips, Claimant has established that as of July 9, 1997 he was totally disabled.

Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and availability. Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 (1988). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989).

Employer argues Claimant could have returned to his previous heavy duty employment as early as July 29, 1997, when he was discharged from Dr. Segura's care. Claimant, on the other hand, argues he was incapable of performing the necessary lifting and bending requirements when he attempted to return to work after his discharge and, therefore, remained totally disabled after that date. This court agrees with Claimant and finds Dr. Segura's release premature. According to Claimant's credible testimony, he found himself incapable of performing the requirements of the heavy duty position offered him on July 29, 1997, and his testimony that no alternative light duty position was available remained uncontested by Employer. Additionally, Dr. Phillips's testimony verifies Claimant's subjective inability to return to heavy labor. Claimant visited Dr. Phillips after being discharged from Dr. Segura's care and Dr. Phillips has opined Claimant has become incapable of performing heavy duty labor requiring him to lift more than fifty pounds since the accident of July 9, 1997. Therefore, Claimant's disability remains total until Employer offers suitable alternative employment in the form of jobs meeting Dr. Phillips' restrictions.

Employer's offer of suitable alternative employment was presented in the labor market survey performed by Ms. Favaloro on October 13, 1998, which identified four available light duty positions. This court finds Ms. Favaloro's labor market survey suffices as suitable alternative employment. All of the positions identified in the survey met Dr. Phillips' restrictions since all were well within the light duty category and required lifting under fifty pounds. While Claimant was not appropriately qualified for one of the dispatcher positions listed because he had no prior experience, the remaining positions fall within his educational abilities, demonstrated in vocational testing, and physical abilities, as outlined by his treating physician, Dr. Phillips. Therefore, as of October 13, 1998, Claimant was and continues to be temporary partially disabled with a wage earning capacity of $6.65 an hour.[3]

IV. Necessary and Reasonable Medical Expenses

Section 7(a) of the Act provides that:

[3] This wage earning capacity was based upon an average of the earnings provided in the labor market survey.

> (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require.

33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984). The claimant must establish that the medical expenses are related to the compensable injury. Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th cir. 1981), aff'g 12 BRBS 65 (1980). Additionally, an employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983).

According to Stipulation 17 located in Court's Exhibit 1, Employer has only partially paid Claimant's medical expenses and Claimant seeks payment of the remainder of his medical bills for treatment associated with this injury. This court finds Claimant has established a prima facie case the medical treatment surrounding this injury has been both reasonable and necessary. All of the evaluations conducted, testing performed, and physical therapy prescribed were related to Claimant's back injury resulting from his July 8, 1997 on-the-job injury and were requested by qualified physicians. While Claimant did not request authorization prior to receiving treatment from Dr. Phillips, as is generally required under the Act, Claimant falls within an exception to the general rule based upon refusal of treatment and therefore his failure to seek prior Employer approval is excused. Following Claimant's release from Dr. Segura, Claimant found himself unable to perform the required duties of his employment and returned to Dr. Segura for further treatment. However, according to the record, Dr. Segura refused Claimant treatment, asserting that no further treatment of Claimant was authorized. Because of this refusal from Dr. Segura, Claimant was authorized to seek treatment elsewhere without Employer's approval. Thus, this court finds Employer is responsible for all of Claimant's past treatment for this injury and all future reasonable and necessary medical treatment related to his July 8, 1997 on-the-job accident.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from July 9, 1997, until October 12, 1998, based on an average weekly wage of $640.66.

(2) Employer/Carrier shall pay to Claimant compensation for temporary partial disability benefits from October 13, 1998, and continuing, based upon an average weekly wage of $640.66 and reduced by a wage earning capacity of $6.65 an hour.

(3) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate of interest shall be calculated at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the auction of 52 week United States Treasury bills as of the date of this decision and order is filed with the District Director. See 28 U.S.C. §1961.

(4) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant under the Act.

(5) Employer/Carrier shall be responsible for Claimant's past and future reasonable and necessary medical expenses, with interest in accordance with Section 1961, which resulted from the injury. See 33 U.S.C. §907.

(6) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have twenty (20) days from receipt of the fee petition in which to file a response.

Entered this ____ day of _____, 1999, at Metairie, Louisiana.

_____

JAMES W. KERR, JR.
Administrative Law Judge

JWK/ac